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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 538

WILLIAM CALVARESI AND JERRY BENALLO, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 548

EUGENE SMALDONE AND CLYDE SMALDONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (J. A. 1-26)[1] is reported at 216 F. 2d 891.

[1] The symbol "J. A." refers to the Joint Appendix accompanying the petitions for writs of certiorari. The symbol "Pet. I" refers to the petition for writ of certiorari filed by Calvaresi and Benallo, and the symbol "Pet. II" refers to the petition filed by Eugene and Clyde Smaldone.

JURISDICTION

The judgments of the Court of Appeals were entered on November 2, 1954 (J. A. 27–31, 2), and the petitions for rehearing were denied on November 16, 1954 (J. A. 31). On December 10, 1954, the time for filing a petition for a writ of certiorari by Eugene and Clyde Smaldone was extended by order of Mr. Justice Clark to January 15, 1955 (J. A. 32), on which date their petition was filed. On December 13, 1954, the time for filing a petition for a writ of certiorari by Calvaresi and Benallo was extended by order of Mr. Justice Clark to January 15, 1955 (*ibid.*). They filed their petition on January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).[2]

QUESTIONS PRESENTED

1. Whether the indictments, which charged petitioners with the substantive offenses of obstructing justice by tampering with jurors and with the bribing of jurors, were legally insufficient because the jurors involved were not named.

2. Whether 18 U. S. C. 206, making it an offense to bribe a juror, covers bribery of a juror who has been summoned on a panel but has not been selected and sworn to sit in a particular case at the time the bribe is extended.

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[2] Petitioners were tried together in the District Court and both petitions can be conveniently answered in one brief in opposition.

3. Whether the trial court was biased and prejudiced against petitioners.

4. Whether petitioners were denied a fair trial as a result of unfavorable press, radio, and television publicity given their case during the period that preliminary proceedings were held.

5. Whether petitioners were prejudiced by being tried jointly.

6. Whether a single agreement envisaging violation of two statutes constitutes two separate offenses of conspiracy for which separate sentences may be imposed. (The Government concedes that the answer is "no," but, as indicated *infra,* believes that the question, as to two petitioners, is academic, and, as to the remaining two, that it is prematurely raised.)

STATUTES INVOLVED

18 U. S. C. 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or hav-

ing attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 206 provides:

Whoever, directly or indirectly, gives or offers any money or thing of value, or any promise or agreement therefor, or any other bribe, to any judge, juror, referee, arbitrator, appraiser, assessor, auditor, master, trustee, receiver, United States Commissioner, or other person authorized by any law of the United States to hear or determine any question, matter, cause, proceeding, or controversy, because of or with intent to influence his action, vote, opinion, or decision thereon, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be dis-

qualified from holding any office of honor, trust, or profit under the United States.

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

The Indictments and Sentences.—During September and October 1953, a series of conspiracy and substantive indictments, involving alleged acts of jury tamperings, were filed against petitioners and others in the United States District Court for the District of Colorado (R. 10–12, 75–76, 85–91, 102–104, 112–121, 148–158).

There were two conspiracy indictments (R. 112–121, 148–158). One of these, No. 13800, charged, in two counts, that, commencing about June 1, 1953, and continuing to the date of the indictment, petitioners, together with one Michael Benallo and others, had conspired to violate 18 U. S. C. 1503, by obstructing the due administration

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of justice, and that, during the same period, they had conspired to violate 18 U. S. C. 206, by offering a bribe to jurors, all in violation of 18 U. S. C. 371 (R. 112–121). The two counts of the second conspiracy indictment (No. 13833), except for the fact that each named an additional defendant and each alleged two additional overt acts relating to such defendant, were substantially the same as the corresponding counts in No. 13800 (R. 148–158).

Each of four substantive indictments named one of the four petitioners, individually, and charged him (in two or more counts) with substantive offenses based upon the pertinent overt acts alleged in the conspiracy indictments (R. 10–12, 75–76, 85–91, 102–104). In each of these substantive indictments, one-half of the counts charged obstruction of justice; the remaining half, bribery of a juror or jurors.

Before trial, petitioners Eugene and Clyde Smaldone pleaded guilty to both counts of conspiracy indictment No. 13833 (R. 158–159, 162–164) and not guilty to the charges of the other indictments. Their co-defendants pleaded not guilty to all charges (R. 91, 105, 122. 13, 76–77, 162–163).

All of the indictments, except the second conspiracy indictment (No. 13833), were consolidated for trial (R. 70, 82, 96, 107, 135, 229–230, 238). After a severance of some of their co-defendants in conspiracy indictment No. 13800,

petitioners were tried together by a jury and found guilty on all charges on October 29, 1953 (R. 135, 230, 71, 82, 97, 107, 136).[3]

The sentences which remain in the case after decision of the Court of Appeals are as follows:

Eugene Smaldone, on eight substantive counts, a total of twenty-five years' imprisonment and $11,000 fine (R. 98–99; J. A. 26, 28); on conspiracy indictment No. 13833, to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the sentences on the substantive counts (R. 165–166).[4]

Clyde Smaldone, on six substantive counts, a total of fifty years' imprisonment and a $24,000 fine (R. 107–108). On the conspiracy indictment to which he pleaded guilty, two consecutive terms of five years' imprisonment to run consecutively to the judgment on the substantive counts (R. 166–167).

William Calvaresi and Jerry Benallo, on four and two substantive counts, respectively, fifteen years' imprisonment and $5,000 fine as to each petitioner (R. 72–73, 82–83); on conspiracy indictment No. 13800, as to each petitioner sus-

[3] Michael Benallo was also tried and convicted with petitioners on conspiracy indictment No. 13800, but his conviction was reversed on appeal (J. A. 25).

[4] A suspended sentence on the conspiracy charge which was tried was reversed on the ground that trial thereunder was double jeopardy in view of the plea of guilty (J. A. 25). Eight of sixteen substantive counts were reversed (J. A. 26, 28).

pended terms of five years' imprisonment (R. 138–140).[5]

Government's Evidence.—The pertinent evidence adduced by the Government may be summarized as follows:

On June 2, 1953, petitioner Eugene Smaldone was a defendant on trial in a criminal tax case in the United States District Court for the District of Colorado. On June 3, 1953, his trial was continued until June 10, 1953, because of his illness. After a resumption of the trial, a mistrial was declared on June 12, 1953, and the case was set down for September 21, 1953, for a retrial. (R. 443, 438, 439, 440.)

A few days following the continuance of the trial, Fiore Smaldone, a first cousin of Eugene and Clyde Smaldone, visited one Mrs. Baer, an acquaintance whom he had not seen for about thirty years (R. 374–375, 378, 381, 382–383, 385, 391). He asked her to "hang the jury" in the Smaldone case (R. 381, 384) and expressed surprise when Mrs. Baer informed him that she had been discharged from the jury panel (R. 381).

On or about June 19, 1953, Fiore Smaldone and petitioner Clyde Smaldone visited one Lawson, with whom they had previously done business, at his automobile agency in Longmont, Colorado (R. 410, 411, 412, 414, 409). They discussed with him

[5] The trial court had also found petitioners guilty of contempt of court on the basis of the evidence adduced at the trial (R. 172–174, 175, 479–480), but the Court of Appeals reversed these convictions (J. A. 26).

Eugene Smaldone's tax case and inquired about Lawson's business acquaintance, Owen Spencer, who was on the federal jury panel (R. 411, 403). They told Lawson that Spencer was on the jury panel and asked whether he "would talk to him [Spencer] if he got on the jury" (R. 411, 404–405). On June 23, 1953, Lawson, while negotiating to sell Spencer a new car, engaged him in a discussion of the Eugene Smaldone tax case, telling him that Smaldone was not guilty and that "he thought he was being framed" (R. 403, 404, 405, 412). Lawson, while discussing Spencer's prospective jury service, offered to make him "a good car deal" (R. 405).

During August, 1953, Fiore Smaldone and petitioner Clyde Smaldone again visited Lawson (R. 412–413). They showed him what they described as a prospective jury list and asked him about three names appearing thereon (R. 413, 417). When he stated that he knew one of the three, they asked him to try to "influence" that individual to "hang the jury" in the tax case (R. 413, 415).

About the beginning of September, 1953, Eugene Smaldone, accompanied by Clyde Smaldone, asked one SaBell to convey his offer of "three-fifty" to Frank Rossi to "sit on the jury in the Eugene Smaldone tax trial" (R. 364, 365–367, 368, 369, 360). SaBell conveyed the offer to Rossi. Rossi, at that time, had not received a jury summons. Subsequently, however, he was

called to the panel. (R. 367–368, 360, 361.) SaBell then reported to Eugene Smaldone that "everything was all right" (R. 368).

In September, 1953, Clyde Smaldone spoke to one Roland, who had obtained some insurance for the Smaldones (R. 370–371). He told Roland that there were "several insurance men on the present jury panel," and, showing him a list of names, asked whether he could identify some of them (R. 372). After Roland identified one name, Clyde Smaldone asked whether the man could be influenced (R. 372–373).

During the early part of September, 1953, Eugene and Clyde Smaldone visited one Walton, their insurance broker (R. 356–357). They asked him whether he knew a certain insurance man. Walton was uncertain. Subsequently, Eugene Smaldone repeated the visit, seeking the same information. (R. 357–358.)

On September 7, 1953, petitioner Calvaresi visited his neighbor, one Mrs. Alsup, who had been summoned for federal jury duty during the September term (R. 323, 326, 332). He told her that Eugene Smaldone had asked him to offer her $250 if she "would sit on the jury" in his case (R. 324, 326, 327, 328, 342–343). On September 9, Calvaresi again visited Mrs. Alsup and repeated the offer (R. 324).[6] He also told

[6] An F. B. I. agent testified that Calvaresi had given him an oral statement admitting that he importuned Mrs. Alsup at the behest of Eugene and Clyde Smaldone (R. 346, 349–352).

her that "somebody was going to get the money" and that it might as well be she (R. 326).

A week later, petitioner Jerry Benallo, an acquaintance of Mrs. Alsup, also visited her (R. 325, 329, 330, 335, 336). He told her that if she "would string along" with the Smaldones, "they would have a nice little gift" for her (R. 325, 330, 337, 339).

About mid-September, Eugene Smaldone called one McCusker to a tavern, where he showed him a list of names. McCusker identified the name of Miss Buschbach, whose father he knew. (R. 430, 432, 425.) Smaldone then asked McCusker to see Buschbach and to inquire concerning the daughter's sentiments about the tax case (*ibid.*). He also told McCusker that he might offer Buschbach $500 (R. 432, 435). McCusker then visited Buschbach and discussed with him the daughter's attitude toward the tax case (R. 433, 436–437).

None of the petitioners testified or offered any evidence in his own behalf, except that petitioners Calvaresi and Benallo offered evidence of good reputation (R. 447–454).

ARGUMENT

1. The substantive indictments on obstruction of justice charged that on a specified date, the respective petitioner

> did corruptly and by threats and force and by threatening communication endeavor to influence, intimidate and impede a petit

> juror of the United States District Court, sitting in and for the District of Colorado, and corruptly and by threats and force and by threatening communication influenced, obstructed, impeded and endeavored to influence, obstruct and impede the due administration of justice in the trial scheduled for the 21st day of September, 1953, The United States of America versus Eugene Smaldone, also known as Checkers Smaldone, in violation of Title 18 USC, Section 1503 [*e. g.* R. 10–11].

The bribery counts charged that, on the same occasions, the respective petitioner

> did directly and indirectly give and offer to give money and a thing of value and a promise and agreement therefor and a bribe to a juror summoned to the panel in the cause of the United States versus Eugene Smaldone, also known as Checkers Smaldone, because of and with intent to influence said juror's action, vote, opinion, and decision thereon, contrary to and in violation of Title 18 USC, Section 206 [*e. g.* R. 11].

Petitioners' contention (Pet. I, 23–25; Pet. II, 13–17), that the substantive indictments are void because they do not identify the jurors to whom they refer, is without merit.[7] An indictment is void for insufficiency where it fails to charge the

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[7] Petitioners do not challenge here the sufficiency of the conspiracy indictments upon which their convictions were affirmed (Pet. I, 24–25; Pet. II, 2, 16).

essential elements of an offense, or where the defect goes to jurisdiction. See Rule 12 (b) (2), F. R. Crim. P. The identity of the jurors, although, as the court below noted (J. A. 9), material in the proof of the offenses charged in the substantive indictments, was not an essential element of the offenses. The assertion (Pet. I, 23–25; Pet. II, 13–17) that the failure of the court below to dismiss the substantive indictments for insufficiency was inconsistent with its statement that the identity of jurors was material to the proof under such indictments completely overlooks the basic distinction between essential matters of pleading and material elements of proof. Without identifying the jurors, the substantive indictments concretely charged two types of offenses: that petitioners, on specified dates, corruptly endeavored to influence petit jurors sitting in the United States District Court for the District of Colorado and thereby impede the due administration of justice in the trial of *United States* v. *Eugene Smaldone,* scheduled for a certain date; and that, on the same dates, petitioners offered bribes to jurors summoned to the panel in the case of *United States* v. *Eugene Smaldone.* Thus, the indictments were sufficient to apprise petitioners of the nature of charges they had to meet and to enable them to plead former jeopardy in the future. See *United States* v. *Josephson,* 165 F. 2d 82, 85 (C. A. 2), certiorari denied, 333 U. S. 838; *Carter* v. *United States,*

173 F. 2d 684, 685 (C. A. 10), certiorari denied, 337 U. S. 946; *Robertson* v. *United States,* 168 F. 2d 294 (C. A. 5).[8]

There is no occasion to consider whether the failure to name the jurors constituted a non-jurisdictional defect. Under Rule 12 (b) (2), F. R. Crim. P., a defect of that character is waived unless raised by motion before trial. See *United States* v. *Williams,* 203 F. 2d 572, 573 (C. A. 5); *Michener* v. *United States,* 170 F. 2d 973, 975 (C. A. 8); *Weatherby* v. *United States,* 150 F. 2d 465, 466 (C. A. 10). No such motion was made.[9]

[8] The claim of petitioners Calvaresi and Benallo (Pet. I, 24), that the substantive indictments were void for failure to charge that petitioners knew that the persons they approached were jurors, is without substance. The allegations that they tried to influence the action of jurors in a named case necessarily alleges that they knew the persons were jurors. See *Parsons* v. *United States,* 189 F. 2d 252 (C. A. 5).

[9] Motions for bills of particulars, seeking, *inter alia,* the names of the jurors (R. 66–69, 80–82, 92, 106, 122–125, 130–131) were denied before trial (R. 70, 82, 96, 107, 135). This was apparently an attempt to find out what witnesses the government intended to use. The names on the panel which was to try Smaldone were available to petitioners and the dates of the attempts to approach the jurors were specifically given in the indictment. Petitioners do not show that the denial prejudiced them in meeting the charges of the indictment. Under the circumstances, the denial of the motions was not an abuse of discretion. *Gates* v. *United States,* 122 F. 2d 571 (C. A. 10), certiorari denied, 314 U. S. 698; *Truck Drivers' Local No. 421, etc.* v. *United States,* 128 F. 2d 227 (C. A. 8); *Chadwick* v. *United States,* 117 F. 2d 902 (C. A. 5), certiorari denied, 313 U. S. 585; *Landay* v. *United States,* 108 F. 2d 698 (C. A. 6), certiorari denied, 309 U. S. 681; see also *United States* v. *Cohen,* 145 F. 2d 82 (C. A. 2), certiorari

2. Petitioners urge (Pet. I, 25–28; Pet. II, 32–35) that the provisions of 18 U. S. C. 206, making it an offense to bribe a juror, should not be deemed to cover bribery of a person who has been summoned on a panel but has not been selected and sworn to sit in a particular case. But the statutory language is plainly broad enough to cover veniremen. It provides that it shall be an offense to bribe *"any * * * juror * * ** authorized by any law of the United States to hear or determine *any question, matter, cause, proceeding, or controversy,* because of or with intent to influence his action, vote, opinion, or decision thereon" (emphasis added). Thus, it necessarily covers a juror summoned on a panel, because as soon as one is so summoned, and until finally discharged, he is a person authorized by law to hear any cause which may be presented in the court, and his actual selection for service on a particular jury merely furnishes him the proper occasion for the exercise of that authority.

The word "juror", itself, has been used almost universally to denote "any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impaneled or not." *United States* v. *Marsh,* 106 Fed. 474, 481 (C. A. 5); see *United States* v.

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denied, 323 U. S. 799. Moreover, the motions by Calvaresi and Benallo with respect to the substantive indictments, filed more than ten days after arraignment (R. 13, 69, 76, 80), were not timely under Rule 7 (f), F. R. Crim. P.

Russell, 255 U. S. 138; *People* v. *Newmark*, 312 Ill. 625, 144 N. E. 338; *State* v. *Maddox*, 80 S. C. 452, 61 S. E. 964; *Marvin* v. *District Court*, 126 Iowa 355, 102 N. W. 119; *State* v. *McCrystol* (La.), 9 S. 922; *Baumgartner* v. *Joughin*, 105 Fla. 335, 141 So. 185. Indeed, in *United States* v. *Russell*, 255 U. S. 138, this Court construed the predecessor of 18 U. S. C. 1503, which punishes, *inter alia*, the intimidation of jurors, to include veniremen. Certainly, there is no reason to suppose that Congress intended to deal more narrowly with corruption of jurors than with intimidation of jurors. It is equally difficult, as the court below stated (J. A. 9), to believe that Congress "intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case."[10]

3. Petitioners claim (Pet. I, 28–31; Pet. II, 27–29) that the trial judge's actions and comments before and during trial evidenced such bias against petitioners as to deny them a fair trial.

[10] There is no basis to the suggestion of petitioners' Calvaresi and Benallo (Pet. I, 25, 28) that the instant decision is in conflict with *United States* v. *Sager*, 49 F. 2d 724 (C. A. 2), which held that the terminology of the predecessor of section 206 did not cover a juror at all. The section was amended for the specific purpose of closing the gap revealed by the *Sager* decision. See 18 U. S. C. 206, Reviser's Note.

In the court below, petitioners argued that the trial judge erred in refusing to grant their motions for his disqualification, and that his various rulings during the trial (such as denying without a hearing their motions for acquittal, invoking the contempt power against them, and imposing severe sentences without inquiring whether they desired to make any statements in their own behalf [11]) confirmed their claims of personal bias and prejudice (R. 1–7; J. A. 38–46). The Court of Appeals, after holding that petitioners' affidavits in support of their motions for the trial

[11] Petitioners' claim (Pet. II, 37–39; Pet. I, 33–34) that the trial court committed reversible error in failing to inquire, prior to imposition of sentence, whether petitioners desired to make statements in their behalf, is without merit. Under the circumstances, the error, if any, was harmless. *Shockley* v. *United States*, 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 234 (C. A. 2). The court below (J. A. 14), although recognizing that in accordance with "the spirit" of Rule 32 (a), F. R. Crim. P., a trial court should ask if a defendant wishes to make a statement in his behalf, noted that petitioners had not "asked or indicated that they desired to make a statement either in person or through competent attorneys representing them, who were then present in court." It then held that, "In the absence of such a request by competent counsel representing them at the time, we cannot say that they were not afforded an opportunity to be heard before sentence was imposed, had they desired such a hearing" (J. A. 14). The pertinent provision of Rule 32 (a) was intended primarily to prohibit the judge from denying defendants the right to make a statement rather than to impose upon him a mandatory duty to inquire whether a defendant desired to make a statement. Cf. *Federal Rules of Criminal Procedure*, New York University School of Law Institute Proceedings (1946), p. 205.

judge's disqualification before trial were, as petitioners now appear to concede (Pet. I, 29; Pet. II, 27), legally insufficient, held further that the matters concerning which petitioners complained related "largely to the exercise of discretion by the court and in themselves alone are not sufficient to show bias and prejudice" (J. A. 12, 13). And it concluded, from a very careful examination of the record (see J. A. 12), that there was no basis for holding "that the trial court's exercise of discretion was arbitrary" (*ibid.*).

It is significant that the petitioners do not point to anything which happened at the trial itself to support their conclusion that they were denied a fair trial. The record shows that, although petitioners made few objections to the evidence during the trial, the court sustained most of their objections and was careful to prevent the reception of improper evidence (R. 324–325, 338–339, 343, 344, 346–347, 348, 354, 358, 361, 362–364, 365, 373, 375–377, 378–381, 382, 383, 385–387, 388, 393–394, 401–402, 404, 408–409, 410, 417, 421–422, 424, 425–430, 436, 438–444). To say that the trial judge erred in some of his rulings, *e. g.*, finding petitioners in contempt of court on the basis of the offenses proved against them at the trial, does not establish bias or prejudice. See *Berger* v. *United States*, 255 U. S. 22, 31. As the Court of Appeals concluded, after its study of the record, the trial was fairly conducted, and the actions of the judge which formed the pri-

mary basis of complaint did not show any "aggressive antipathy" or such "a bent of mind" as to "prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U. S. 22, 33; *Eisler* v. *United States*, 170 F. 2d 273 (C. A. D. C.); see also *Connelly* v. *United States District Court*, 191 F. 2d 692 (C. A. 9).

4. Petitioners contend (Pet. I, 31–33; Pet. II, 21–27) that unfavorable press, radio and television publicity given their case at the time of their arrest and during the various stages of preliminary proceedings so inflamed public opinion against them that they could not receive a fair trial in the District of Colorado, and that the trial court abused its discretion in denying their motions for change of venue.[12] There is, however, no evidence of any communal prejudgment of the instant case. And, as the court below pointed out (J. A. 13), "There is no affirmative evidence in the record that any juror had a bias or prejudice against any of the defendants which would prevent him from discharging his duty as a juror." It is a relevant consideration, moreover, that the evidence overwhelmingly proved petitioners' guilt on most counts.[13] Indeed, save for

[12] Petitioners made no motion for continuance on the ground that they were tried in a hostile atmosphere. Such motion was made on other grounds (R. 242, 243).

[13] The fact, upon which petitioners place some reliance (Pet. I, 33; Pet. II, 22), that several counts on which the jury returned a verdict of guilty were reversed by the court below for lack of evidence, "is not", as the court below held,

some reputation evidence on behalf of Calvaresi and Benallo, petitioners offered no evidence in their defense.

The claim that bias is to be imputed to an entire community requires a strong showing. *Stroble* v. *California,* 343 U. S. 181; *Dennis* v. *United States,* 339 U. S. 162, 168, 171–172; *Frazier* v. *United States,* 335 U. S. 497; *Shockley* v. *United States,* 166 F. 2d 704, 709–710 (C. A. 9), certiorari denied, 334 U. S. 850; see also *Finnegan* v. *United States,* 204 F. 2d 105, 110 (C. A. 8), certiorari denied, 346 U. S. 821; *Rakes* v. *United States,* 169 F. 2d 739, 746–747 (C. A. 4), certiorari denied, 335 U. S. 826. Prejudice sufficient to establish grounds for change of venue must be measured by its effect on jurors called to sit in judgment, and must be of sufficient intensity to preclude the attainment of "that fundamental fairness essential to the very concept of justice." *Stroble* v. *California, supra,* at 191–193; cf. *Holt* v. *United States,* 218 U. S. 245, 248; *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2), certiorari denied, 343 U. S. 965. Unless the existence of such conditions is apparent, blanket allegations of bias are more properly reserved for examination on *voir dire,* at which time the attitudes and prejudgments of veniremen can be more accurately tested on full examination. *Colosacco* v. *United States,* 196 F. 2d 165, 168 (C. A. 10); cf. *Reynolds*

"sufficient in itself to convict a jury of bias and prejudice" (J. A. 13).

v. *United States,* 98 U. S. 145, 155–156; *Allen* v. *United States,* 4 F. 2d 688, 696–698 (C. A. 7); see *United States* v. *Moran,* 194 F. 2d 623 (C. A. 2). Here the record shows painstaking care on the part of the trial court in the examination of the panel (R. 244–321).[14] Petitioners emphasize (Pet. I, 32; Pet. II, 23) that 22 of the 57 prospective jurors examined indicated that they had formed opinions with reference to the case. It does not follow that the selected jury was biased. Viewed in context, this circumstance reflects the care with which the jury was screened.

Petitioners rely heavily (Pet. I, 33; Pet. II, 24–25) upon *Delaney* v. *United States,* 199 F. 2d 107, 113 (C. A. 1), in which it was held that a careful *voir dire* examination could not properly screen out "preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity." But that case is clearly distinguishable. There, the publicity was generated by Congressional committee hearings and had a direct relationship to the establishment in the public mind of the defendant's guilt. It was predicated upon investigative reports of the committee, a fact-finding body. The publicity in the instant case consisted of accounts of the pre-trial proceedings—proceedings which obviously involved no determinations as to the merits. If because of the noto-

[14] It is also significant that the selection of veniremen was not limited to the city of Denver, where the case was tried, but extended to a large portion of Colorado.

riety of the individuals involved, the publicity was greater than usually obtains in criminal cases, that alone did not warrant a change of venue. See *Shockley* v. *United States,* 166 F. 2d 704, 709 (C. A. 9), certiorari denied, 334 U. S. 850; cf. *United States* v. *Rosenberg,* 200 F. 2d 666, 668–669, (C. A. 2), certiorari denied, 345 U. S. 965.[15]

5. Petitioners Calvaresi and Benallo, relying on *Kotteakos* v. *United States,* 328 U. S. 750, assert (Pet. I, 21–23) that they were prejudiced by being tried with one another and with other defendants. The suggestion is that the evidence showed a number of separate conspiracies, each relating to a separate episode of jury tampering; that there was insufficient proof to establish that Calvaresi and Benallo were parties to any general conspiracy; and that joinder of indictments was improper since the offenses in question did not involve the same acts or transactions or a common scheme or plan. It is also suggested that, at a minimum, there were two conspiracies, one relating to the effort to influence the June panel and the other to influence the September panel; that it is, indeed, inconceivable that conspirators undertaking to corrupt the June panel would an-

[15] The claim of petitioners Calvaresi and Benallo (Pet. I, 31), that this Court's ruling in *Shepherd* v. *Florida,* 341 U. S. 50, is applicable to the instant case, is without merit. There was evidence, in that case, of actual terrorism extending to the court room so as to deny the defendants their rights to due process. This is not such a case.

ticipate a mistrial and plan, *ab initio* to influence a subsequent panel; and that there is nothing to connect those petitioners with the June conspiracy.

As the Court of Appeals held, the evidence abundantly established a general, overall plan which had as its single and consistent purpose the procurement of Eugene Smaldone's acquittal in his criminal tax case. The evidence showed further that Calvaresi and Benallo separately importuned Mrs. Alsup for this very purpose. It is also inferable that these petitioners knew that the Smaldones were enlisting other persons to further the object in view by importuning other jurors. They were aware that there was no assurance that Mrs. Alsup would actually sit on the Smaldone tax case and that the chances of procuring an acquittal bore a direct ratio to the number of persons on the panel who would be prepared to abandon their obligations. In fact, Calvaresi advised Mrs. Alsup that if she did not accept the proffered bribe someone else would get it.

It is plain, in short, that there was a common, informed purpose in the various efforts to influence the individual jurors and that these efforts were part and parcel of the same continuing scheme. The situation is thus markedly different from that involved in *Kotteakos* and closely akin to that presented by *Blumenthal* v. *United States,* 332 U. S. 539. As this Court

stated in the latter case (p. 557), "the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity."

The argument that, at the least, there must have been two independent conspiracies has no substance. It is immaterial whether those who planned to influence the June panel foresaw the possibility of a mistrial (an eventuality, it may be noted parenthetically, hardly remote). The short answer is that the ultimate and unchanging object of the scheme—Smaldone's acquittal—had not been realized when the mistrial occurred. There is no evidence that the scheme was abandoned at that point and there is affirmative evidence (the legal presumption of continuity aside) that it continued. The fact that the bribery efforts of Calvaresi and Benallo were directed to a member of the September panel is likewise immaterial. One who enters a continuing conspiracy cannot evade responsibility for acts occurring prior to his entry.

Another contention based on allegedly improper joinder is raised by petitioners Eugene

and Clyde Smaldone (Pet. II, 17–21). Although their conviction on the conspiracy charges for which they were tried was reversed (on the ground that the indictment charged the same offenses as the conspiracy indictment to which they pleaded guilty), they urge that they did not receive a fair trial because evidence which would have been inadmissible on the substantive counts was admitted on the conspiracy counts. However, since Calvaresi and Benallo were properly tried for conspiracy, all evidence relating to the conspiracy was properly introduced. The conviction of the Smaldones on the substantive counts had to be based on the evidence relating to those specific counts.[16] Moreover, the substantive counts were based on the same overt acts involved in the conspiracy counts, and the evidence showed such direct participation of the Smaldones in so many overt acts that any slight additional evidence relating to co-conspirators which might have been admitted against them must have been cumulative. There is thus no showing of prejudice.

6. Petitioners argue, for the first time in this Court (Pet. I, 18–20; Pet. II, 30–32), that, since the Government proved but one overall conspiracy, consecutive sentences could not be imposed on the basis of each of the two counts of the

[16] Petitioners were apparently satisfied with the charge, which is not included in the record. Presumably, therefore, it correctly charged as to the evidence tending to prove the substantive offenses.

conspiracy indictment. We concede that this contention is sound. *Braverman* v. *United States,* 317 U. S. 49, 53. As to Calvaresi and Benallo, however, the question is academic. They received suspended sentences on both counts of the conspiracy indictment; they were not placed on probation in consequence of such suspension; and the sentences were made to run concurrently with the sentences on the substantive counts. See *Pinkerton* v. *United States,* 328 U. S. 640, 641–642.

Eugene and Clyde Smaldone, on their pleas of guilty to the two counts of conspiracy indictment No. 13833, were sentenced to consecutive terms. Since the counts to which they pleaded guilty charged, on their face, two offenses, the nature of the evidence to support the conviction based on that pleading would not normally be open for review. See *Harlan* v. *McGourin,* 218 U. S. 442; *Eury* v. *Huff,* 146 F. 2d 17 (C. A. D. C.). But in view of the fact that the court below found the indictment in No. 13800 to cover the same matters as the indictment in No. 13833, and the proof under No. 13800 established only one offense, we agree that one of the five-year sentences resting on conspiracy indictment No. 13833 should be vacated. We believe, however, that relief should properly be sought by way of a motion in the District Court under Rule 35, F. R. Crim. P., to correct sentence rather than on the petition for certiorari, since petitioners failed to

make a motion at the time of their plea that the Government elect upon which count to proceed and since they failed to raise the issue in the District Court or in the Court of Appeals.[17] [18]

CONCLUSION

The sentences imposed upon the petitioners in these cases were undeniably severe. Justice in criminal cases depends not only upon the fairness of procedures during the trial but upon the reasonableness of the sentence imposed in the event of conviction. It is unfortunate when sentences in a serious case have not received, together with the other aspects of the case, the benefit of independent examination by an appellate tribunal.

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[17] The same procedure should be followed in correcting the error (which we concede) asserted by petitioner Clyde Smaldone at Pet. II, p. 17, note 9.

[18] The contention of petitioners Eugene and Clyde Smaldone (Pet. II, 35–39) that the sentencing judge had no power to impose sentences upon them under indictment No. 13833 because another judge of the court took their guilty pleas thereto is frivolous. Both judges were members of the same court with coordinate and concurrent jurisdiction. Thus, either one had the power to impose the sentence. *Owens* v. *Hunter*, 169 F. 2d 971, 972 (C. A. 10). Petitioners themselves admit (Pet. II, 37) that their sentences were not void. Nor do they claim that they were in any way prejudiced by such sentencing. Although, ordinarily, within the spirit of Rule 25, F. R. Crim. P., the judge who accepts the plea of guilty should also impose the sentence, the instant situation was not ordinary—conspiracy indictment No. 13833 was based upon the same transactions involved in all the other indictments upon which sentences were to be pronounced, and, furthermore, the sentencing judge was requested by the other judge to impose the sentence (R. 485).

The absence of authority for appellate review of sentences is a weakness in our jurisprudence.

But this Court cannot assume that the sentences here are, under the circumstances, excessive. If the question were reviewable, the record would doubtless reflect what is not now in the record, namely, the detailed reasons brought to the attention of the trial court which led to the imposition of the sentences. The factual context of the case was fully developed before the sentencing judge; it is not before this Court.

In any event, this Court has indicated that federal appellate tribunals cannot review sentences which are within the statutory limits. As Judge Learned Hand, expressing the prevailing view of the law, observed in a case in which he believed that the sentencing power had been unwisely exercised, "We are not ourselves able to intervene, though if we could, we should not hesitate to do so." *Nash* v. *United States,* 54 F. 2d 1006, 1008 (C. A. 2). In our view, no other aspect of the instant case warrants the Court's intervention.

Respectfully submitted,

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